

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 12 2005

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TRENT DAVIS,

Defendant - Appellant.

No. 03-10659

D.C. No. CR-03-05054-REC

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Senior District Judge, Presiding

Submitted December 5, 2005**

Before: GOODWIN, W. FLETCHER and FISHER, Circuit Judges.

Trent Davis appeals the 235-month sentence imposed following his guilty plea conviction for conspiracy to distribute cocaine base and possession with intent to distribute phencyclidine, all in violation of 21 U.S.C. §§ 841(a)(1) and 846. We

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

have jurisdiction pursuant to 28 U.S.C. § 1291.

We reject Davis' contention that the district court erred under Federal Rule of Criminal Procedure 32 by failing to resolve a disputed drug amount, because the district court stated that the base offense level it applied was supported by the drug amount stipulated in the plea agreement. *See* Fed. R. Crim. P. 32(i)(3)(B) (requiring a district court to address disputed portions of the presentence report at sentencing).

We also conclude that the government did not breach the plea agreement, because the government did not recommend a leadership enhancement and did not argue for the use of a drug amount larger than that stipulated to by the parties. *See United States v. Caperell*, 938 F.2d 975, 979-80 (9th Cir. 1991).

Because appellant was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 915-16 (9th Cir. 2005).

REMANDED.